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ATTORNEYS AT LAW

March 9, 2006

Ex Parte

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *Petition for Declaratory Ruling that UniPoint Enhanced Services, Inc., d/b/a PointOne and Other Wholesale Transmission Providers are Liable for Access Charges, WC Docket No. 05-276.*

Dear Ms. Dortch:

On January 24, 2006, AT&T Inc. ("New AT&T") filed a notice informing the Commission of a recent decision of the United States District Court for the Northern District of Texas vacating as moot a Bankruptcy Court decision that addressed the proper regulatory treatment of communications services provided by Transcom Enhanced Services (the "Order"). PointOne¹ takes this opportunity to explain the procedural posture of that Order, and its accordingly limited relevance to this proceeding. PointOne also (1) responds to New AT&T's counterfactual argument that PointOne has failed to prove it is not a common carrier; (2) reiterates certain flaws in New AT&T's test for the imposition of access charge liability; (3) notes differences between its showing in this proceeding and USA Datanet's; and (4) urges the Commission to adhere to its existing rules and precedents and devise new access charge rules only in the course of already-pending comprehensive proceedings.

The Order filed by New AT&T has no bearing on PointOne's demonstration that it is an ESP not subject to access charges, as it does not reflect an evaluation by the District Court of the merits of the Bankruptcy Court's Transcom decision. Instead, the District Court vacated the Bankruptcy Court's order because it had been mooted by Transcom's failure to pay a cure amount as directed by the Bankruptcy Court.² Most importantly, the District Court's decision to

¹ UniPoint Services Inc. and UniPoint Enhanced Services, Inc. (d/b/a "PointOne") are two wholly owned Texas subsidiaries of UniPoint Holdings, Inc. For simplicity, these three parties are collectively referred to herein as "PointOne." This designation does not waive or in any way concede the corporate separateness of those three entities.

² See Order at 5-6 (attached to New AT&T's January 24, 2006 filing).

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vacate the Bankruptcy Court's order does not call into question the substantial binding authority cited by PointOne to show that it is an ESP.³

In its reply comments in this proceeding, New AT&T contends that PointOne's declaratory evidence concerning its contracting practices is somehow insufficient to demonstrate that PointOne is not a common carrier. This claim is mystifying, as PointOne's evidence, unlike the material New AT&T submitted, goes directly to the test for common carriage vs. private carriage articulated by the Commission and the courts. New AT&T's suggestion that PointOne's detailed and un rebutted evidentiary showing somehow dictates a conclusion that PointOne is a common carrier therefore confounds logic.⁴

New AT&T also contends that PointOne's access charge liability turns on whether ultimate end users – end users who are not PointOne's customers – are “aware” of the enhancements PointOne offers.⁵ Putting aside the impossibility of administering a rule that would assign access charge liability on the basis of individual end-user “awareness,” PointOne's liability for access charges cannot turn on the conduct of its wholesale customers. PointOne controls its own offerings, not the offerings of its wholesale customers, and PointOne offers those customers information services. As PointOne has previously explained,⁶ the Commission's governing statutes provide that determination that a service is an enhanced or information service depends on the nature of the service “offered.” PointOne has demonstrated that it offers enhancements on each and every communication session, and therefore must be treated as an ESP/ISP.

The Commission recently included in this docket a petition seeking a declaration that USA Datanet is liable for originating access charges in certain circumstances. The questions presented by that petition are distinct from those arising from New AT&T's petition, as PointOne has shown that it is an ESP/ISP and not a common carrier, and for these reasons is not liable for access charges. USA Datanet, by contrast, has not described any enhancements that it offers or shown that it is not an IXC.⁷ According to the comments filed pursuant to the USA Datanet petition, unlike PointOne USA Datanet apparently markets itself primarily to end-user

³ See Comments of PointOne at 2-12 (filed Nov. 10, 2005); Reply Comments of PointOne at 2-5 (filed Dec. 12, 2005).

⁴ Notably, in the underlying District Court proceedings (where New AT&T is subject to the provisions of Rule 11 of the Federal Rules of Civil Procedure), New AT&T studiously avoided alleging in either their original or Amended Complaint that PointOne is an interexchange carrier and instead asserted liability on the theory that PointOne provided telecommunications services on an interexchange basis.

⁵ Reply Comments of AT&T Inc. at 10 (filed Dec. 12, 2005).

⁶ Comments of PointOne at 9-12; Reply Comments of PointOne at 2-5.

⁷ PointOne is not suggesting that USA Datanet does not provide enhancements or is an IXC, only that their current filings to date do not speak to either issue. Additionally, PointOne's knowledge of USA Datanet's business operations, network, or enhancement is limited to what is available in the public domain.

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customers as a provider of traditional long distance service and has a direct relationship with end-user customers. As a result of these material factual differences, any conclusion that USA Datanet is liable for access charges cannot give rise to a conclusion that PointOne is similarly liable.

Finally, the Commission should decline to rewrite its rules in the context of a declaratory ruling proceeding. Because the relief New AT&T seeks would represent a sharp departure from the Commission's existing rules and precedent, it may only be granted in the context of a full rulemaking. The contrast between the facts presented in the USA Datanet petition and those relevant to PointOne's services highlight the dangers in the Commission attempting to effectuate policy and rule changes outside of a comprehensive rulemaking. There are appropriate proceedings, such as the Commission's intercarrier compensation and IP-enabled services proceedings, in which New AT&T may advocate for the far-reaching relief and rule changes it seeks here, and the Commission should address the issues raised by New AT&T in those comprehensive proceedings.

Sincerely yours,

A handwritten signature in black ink, appearing to read "BDS", followed by a horizontal line extending to the right.

Brita D. Strandberg
Counsel for PointOne